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No. 646.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

FRANK BROWN,

Petitioner,

v.

STATE OF VERMONT and ROBERT W. SMITH, Warden,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

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January 4, 1963

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The unanimous, July 17, 1962 opinion and order of the United States Court of Appeals for the Second Circuit, 306 F. 2d 596 (2d Cir., 1962), upholding the state court conviction of petitioner for arson causing death, is set forth in Appendix A to the petition for a writ of certiorari. That order reversed the order of the United States District Court for the District of Vermont, 200 F. Supp. 885 (D. Vt., 1961),

(365b[1]; Timbers, J., sitting by designation) which had directed petitioner's release on a writ of habeas corpus from a life sentence. The Court of Appeals thereby reaffirmed the facts as found by the Supreme Court of the State of Vermont, 122 Vt. 59, 163 A.2d 845 (1960), certiorari denied 365 U. S. 822 (1961).

Jurisdiction.

The petition for a writ of certiorari was timely filed under an order of Associate Justice John M. Harlan (Appendix E). The jurisdiction of this Court is properly invoked under 28 U. S. C. §1254(1).

Questions Presented.

(A restatement of the four issues presented by petitioner.)

I. Concerning the Case:

1. Whether the facts support a claim that one newspaper article's factual report of petitioner's arraign-

[1] There were three appendices in the Court below which are now on record in this Court:

Appendix A, pages 1a to 208a, containing the record in the state trial court of the proceedings which are here in issue, including copies of all exhibits on the issue of pretrial publicity;

Appendix B, pages 1b to 470b, containing the post conviction state proceedings and the proceedings in the United States District Court; and

Appendix C, pages 1c to 118c, in part duplicative of material in Appendix B, containing other matter relied on by petitioner in the Court below.

Reference herein to these Appendices shall be simply by lettered page: for example, (365b). Reference to the Appendices to the petition shall include the word Appendix: for example, (Appendix A, p. 3).

ment in open court deprived petitioner of a fair trial three months later, when no request was made for a continuance and no juror was seated subject to challenge by petitioner's experienced attorneys?

2. Whether the Vermont Supreme Court properly decided the question of its own jurisdiction?

II. Concerning the Court of Appeals' Procedures:

3. Whether, when a district court grants a writ of habeas corpus on the basis of a state court record, a court of appeals may also examine that record and reject as "clearly erroneous" and "speculation" findings of the district court which have no support therein?

4. Whether a court of appeals, after having decided adversely to a petitioner the particular issues presented by him, may examine the rest of the record to satisfy itself that petitioner, a prisoner seeking release from a life sentence, is not entitled to release on other grounds?

Statement.

On July 23, 1959, the Windham County (Vermont) grand jury filed an indictment charging the petitioner with a capital crime, arson causing death. Petitioner was already represented by counsel of his own choosing.

On July 27, 1959, the petitioner was arraigned on the indictment and hearing was had on his motion for fixing of bail, admission to bail being a matter within the discretion of the court in capital cases in Vermont. The hearing was held in Newfane, Vermont, the county seat of Windham County, as were all proceedings in the trial court.

"State Prosecutor's Public Disclosure of Petitioner's Prior Criminal Record."[2]

In support of his motion for bail, the petitioner produced one witness, a doctor. During cross examination,

[2] Petition for a writ of certiorari, page 3.

the deputy attorney general questioned the witness as to whether the petioner's background might affect the witness' opinion concerning the "tension" which he stated incarceration would produce in petitioner. The prosecutor asked if a background of arrests and incarcerations would affect the witness' opinion. Upon objection to the question, the deputy attorney general stated:

> I think the Court can order the Courtroom cleared but I believe this is pertinent to the inquiry under discussion which is whether or not bail should be granted in the Court's discretion and the respondent in his applicated (*sic*) is started off with an opinion by the doctor based on medical reasons. The State should have an opportunity to see if the doctor has all the facts regarding the background.[3]

The Court ruled that the inquiry could be made if specific crimes were not mentioned. As a result, nowhere in the record is there any information as to what crimes may have been charged against the petitioner or of which he may have been convicted.

The petitioner objected to the ruling of the Court *solely* on the grounds of relevancy (11a), and was overruled.

On page 6 of the petition for a writ of certiorari, the "summing up" of the deputy attorney general at the bail hearing is quoted in part only. After referring to the part of the petitioner's criminal record when he was in Boston between 1928 and 1944 and stating "And I don't want to prejudice the respondent," the prosecutor continued:

> Maybe at the Bench we could discuss that aspect because one of the things you must consider is a likelihood of flight. The only issue is will he be here

[3] Quoted in part only in the petition, page 5. The entire transcript of the bail hearing is printed at 7a to 15a.

> and on that issue it's been held time and again the seriousness of the crime is one element. It is not simply the act of the State in charging this man. The background of the respondent is one of the major considerations on this issue.
>
> Court: I think, Mr. Debevoise, we will let it stand at your statement, at what has been admitted already as to his background. We would like to confer about this if you don't mind gentlemen. We will recess for ten minutes (14a).

After the recess, the Court denied bail and remanded the prisoner to the custody of the sheriff.

No claim is made in the petition concerning any "public disclosure of petitioner's prior criminal record" other than in open court at the bail hearing described above.

"Repetition of the Disclosure in the Press."[1]

On July 28, 1959, the day following the bail hearing, the Brattleboro Daily Reformer, a local newspaper, published an account of the hearing which the Court of Appeals found to be "factual and restrained and accurately related what had occurred at the public proceedings in the County Court at Newfane the day before" (Appendix A, page 5).

The fifth paragraph only of the single column news article is set forth at page 6 of the petition. (The whole article is reproduced at 38a). The sixth paragraph reads as follows:

> Debevoise stated that the only issue was the likelihood of flight and considering Brown's background his release on bail was not feasible.

This one newspaper article is the only instance which is claimed to be a "repetition of the disclosure" of petitioner's criminal record in the press.

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[1] Petition, page 3.

Motion for a Change of Venue.

Two months after the single newspaper article referred to above, a hearing on a petition for a change of venue was held at Newfane. The entire transcript of the hearing and all exhibits are reproduced at 18a to 50a.

> The only witness called to establish the existence of prejudice was A. Luke Crispe, counsel for the previous owners of the drugstore who had taken the store back on foreclosure and who admittedly would be in a better position to collect on the insurance if Brown was acquitted. While Mr. Crispe gave his opinion that the publicity had definitely created prejudice against Brown, he also stated categorically that he was not saying that Brown could not get a fair trial in the county (Opinion, Court of Appeals, Appendix A, page 6).

The petitioner mentions a part only of Mr. Crispe's testimony at Petition, page 7, where the witness is referred to as "an official of the Vermont Bar Association" (See 34a). The motion for a change of venue was denied in the discretion of the presiding judge (54a).

The Trial Jury.

Three months after the single newspaper article referred to above had been published, the selection of a jury for petitioner's trial commenced. No continuance of the trial date was requested by petitioner. The entire transcript of the *voir dire* examination of prospective jurors is printed at 59a to 208a. The examination was conducted according to established procedures which were requested by the petitioner (59a).

> Our examination of the record relating to the selection of the jury discloses no unfairness or likeli-

> hood of prejudice. Brown's counsel were given every latitude in questioning, and, in the words of the Vermont Supreme Court, "Each prospective juror was ably and exhaustively examined for indications of prejudice by the two experienced counsel for petitioner." • • • The court was liberal in excusing prospective jurors for cause, and no juror sat who had been challenged by the defense. • • • (Opinion, Court of Appeals, Appendix A, pages 15-16).

Ten days after the start of the trial, on November 7, 1959, the jury returned a verdict of guilty and recommended life imprisonment. In addition to motive and expert testimony of incendiary origin, the evidence had shown that the petitioner left the store where the fire originated after the fire had already started. Several persons managed to escape from the building, and the victim of the fire was removed a half hour later after the accelerants had been brought under control.

State Appeal.

Twenty-six days after the verdict, the judgment order was filed, copies mailed to the petitioner's attorneys, and the 30 day, statutory time limit within which to file a notice of appeal started to run. The petitioner made no attempt to file a notice of appeal with the clerk of the trial court during that 30 day period.

On January 5, 1960, after time within which to file notice of appeal had expired, the clerk of the trial court issued his *mittimus*, placing the petitioner in state prison in accordance with the judgment of the court. "Having done so, he is not to be put in the vulnerable position of not being able to rely on the statute," the Supreme Court of Vermont stated when holding that it was without jurisdiction to hear the

appeal, notice of which was filed with the clerk on January 5, 1960, after he had issued his *mittimus* to the sheriff (2b and 13b, *et seq.*).

After deciding adversely to the petitioner on the issues presented by him in post-conviction state proceedings and in this proceeding, the Supreme Court of Vermont and the United States Court of Appeals both independently examined the record to satisfy themselves that there were not other issues raised by the record compelling petitioner's release. The Court of Appeals stated in the last paragraph of its opinion:

> • • • We fully agree with the conclusion of the Vermont Supreme Court when it said in its opinion on the new trial motion, "We fail to find that any injustice was suffered by this petitioner upon trial • • •".

Argument.

The facts do not support the contention of the petitioner that he was deprived of a fair trial by an impartial jury. There is no dispute as to the law.

The facts which are urged as supporting a claim of denial of due process are contained in the record of the state court proceedings from the time of filing the indictment, July 23, 1959, through the selection of the trial jury on October 28, 1959. All of such facts, including testimony and exhibits, are to be found at 1a through 208a.

1.(a) The facts do not support an issue concerning a prosecutor's duty to insure a fair hearing.

Assuming (1) that this Court's supervisory powers over state prosecutors are as broad as those over federal

prosecutors, and (2) that the same standards which would compel a reversal under those powers would also require the granting of a writ of habeas corpus, the facts of this case would cause this Court to affirm the Court of Appeals under established law about which there is no dispute.

Here the prosecutor, on the subject of bail at an arraignment in open court, after suggesting that the courtroom be cleared (a suggestion not adopted by defense counsel), brought out certain facts concerning part of the criminal record of the accused. The arraignment was factually reported in a restrained manner in one newspaper on the following day. There is no case cited by the petitioner which suggests that a jury verdict should be reversed on such facts alone.

And those are the only facts being urged to create an issue as to this Court's supervisory powers over state prosecutors.

There is no claim here that the prosecutor or any state official released any information to the press concerning the petitioner, the crime or petitioner's connection with the crime. There is no claim here that any such information even appeared in the press, other than in the one newspaper article reporting the court proceedings which is mentioned above.

1.(b) The facts do not support an issue concerning the impartiality of the jury.

There was no request for a continuance of the trial by either of the two experienced counsel of petitioner's choice. The trial commenced three months after the newspaper article mentioned above.

The *voir dire* examination of prospective jurors was conducted under procedures requested by the petitioner.

An examination of the transcript of the *voir dire* examination reveals that petitioner's direct questioning of prospective jurors was unrestricted.

No juror was selected who had been challenged by the petitioner. "The record shows that the respondent was content with the jury as drawn" (49b), until after it had found him guilty. Cf. *Beck* v. *Washington*, 369 U. S. 541 (1962).

2. The facts do not support an issue as to whether or not the Vermont Supreme Court correctly decided the question of its own appellate jurisdiction.

The Vermont statute required "the filing of a notice of appeal as hereinafter set forth with (1) the clerk of the court appealed to and (2) the clerk or register of the tribunal appealed from * * *."[5] The requirement is clear that a notice must be filed with the clerk of the trial court which has the case. 30 days from the date judgment is entered is permitted for the filing.[6]

The petitioner failed to file the notice of appeal with the clerk of the court from which he was appealing prior to expiration of the time for filing. The clerk issued his *mittimus* prior to receiving such notice out of time. The Supreme Court of Vermont dismisssed the appeal for lack of jurisdiction. Cf. *United States* v. *Robinson*, 361 U. S. 220 (1961); *Brown* v. *Allen*, 344 U. S. 443, 482-87 (1952); *Wilkinson* v. *United States*, 278 F. 2d 604 (C. A. Utah, 1960); *certiorari denied*, 363 U. S. 829.

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[5] 12 Vt. Stat. Ann. §2382 (1959).

[6] 12 Vt. Stat. Ann. §2383 (1959); it should be noted that the Federal Rules of Criminal Procedure permit only 10 days for such filing, Rule 37(a)(2).

3. A court of appeals may reject findings of a district court which are unsupported by the record.

The District Court took no testimony and based its lengthy opinion on the record of the state court proceedings. The Court of Appeals did not decide as petitioner states at page 17 of the Petition that therefore "it was free to draw its own conclusions on the record before it."[7] The Court of Appeals stated:

> But on our own examination of the *voir dire* transcript as well as the testimony and exhibits pertaining to the motions for a change of venue, we find so little support for his conclusions that we must reject as clearly erroneous his conclusion that Brown was tried by a prejudiced jury. (Appendix A, page 11).

If a court of appeals were not permitted to examine a record to determine whether a district court's findings have support therein, there would be no provisions permitting an appeal in a case such as this where the issues are factual. Citing *Irvin* v. *Dowd*, 359 U. S. 394 (1959) fifteen times, the District Court had turned the one factual newspaper article about which petitioner now objects into——

> Publicity by newspaper and radio which blanketed Windham County concerning the case and petitioner's connection with it (391-2b); * * * Saturation coverage of the community with stories about the fire, petitioner's complicity in the alleged crime and the State's investigation of the crime (400b); *et al.*

The District Court's findings were clearly at odds with those of the state trial court and the Vermont Supreme Court.

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[7] Similarly the Court of Appeals did not find the petitioner prejudiced as stated at page 14 of the petition where the Court is quoted completely out of context.

The right, indeed the duty, of a Court of Appeals to reject findings of a District Court which are unsupported by the record and are used to overturn findings of state courts poses no serious issue nor affords any special or important reason to grant a petition for a writ of certiorari.

4. The petitioner complains because, after deciding the issues presented by the petition for a writ of habeas corpus, the Court of Appeals read the minutes of the trial to satisfy itself on other issues which he had not briefed.

In the last paragraph of its opinion, after deciding the issues presented by the petitioner, the Court of Appeals notes that, in addition, it has examined the minutes of the trial and finds ample evidence to sustain petitioner's conviction and little likelihood of any substantial claim of error in the conduct of the trial. Contrary to petitioner's implication at page 3 of the petition, the Court of Appeals could not have made this examination of a different part of the record the basis for its clear and well reasoned decision on the issues presented by the petitioner.

The action of the court below in satisfying itself that no other obvious ground appeared to justify an order for the early release of a prisoner is surely not to be censured. If it be error, it is not error that would support the granting of the writ of habeas corpus. But surely such action should not even be classified as "error" in the proper administration of criminal justice. It should be noted that the Supreme Court of Vermont apparently fell into the same "error" when it "*ex parte*" examined the whole record in connection with the petitioner's motion for a new trial (45b, *et seq.*).

Conclusion.

The facts do not support any new constitutional issue, and the decision of the Court of Appeals is in accord with the decisions of this Court. No special or important reason for granting the petition having been shown, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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January 4, 1963.